

JUDGMENT AND ORDER

Challenge in this first appeal is made against the judgment and decree dated 31.03.1997 passed in Title Suit No. 22 of 1991 (titled as Nibaran Chandra Nath Vs. Kumud Chandra Nath & Ors.) by the learned District Judge, Nalbari, whereby and whereunder the learned District Judge, dismissed the suit holding that the suit is not maintainable for want of notice under Section 106 of the Transfer of Property Act, 1882 (Act 1882 for short) and notice under Section 11 of the Assam Non-Agricultural Urban Areas Tenancy Act, 1955 (Act 1955 for short).

2. The appeal originally came up for hearing before a Single Bench who after hearing both the parties allowed the appeal vide judgment dated 07.10.1999. On being aggrieved, the respondent herein preferred an LPA being No.16/1999 before a Division Bench of this Court. The Division Bench disposed of the LPA by setting aside the judgment passed by the learned Single Bench and remanded the case for fresh decision on merits of the entire appeal. Accordingly it has been listed before this Court for final disposal.

3. Heard Mr. N Choudhury, learned counsel appearing for the appellant. Also heard Mr. P.C Deka, learned Senior counsel assisted by Mr. N Deka, learned counsel appearing for the respondents.

4. In order to determine the case of the contesting parties as to whether the notice under Section 106 of the Act 1882 and notice under Section 11 of the Act, 1955 as held by the learned District Judge, Nalbari, are required in order to maintain the suit, facts of the case in a nutshell is summarized hereinbelow:

The appellant herein as plaintiff has brought a suit being Title Suit No. 22 of 91 on the file of the learned District Judge, seeking the following reliefs: -

- a. A decree for a declaration of right, title, interest over the suit land and the suit house described in Schedule B of the plaint;
- b. a preliminary decree for partition in favour of the plaintiff for issuing a separate patta in respect of the suit land;
- c. a decree for khas possession of the suit land and the suit houses be passed in favour of the plaintiff by evicting the defendant Nos. 1, 2 and 3;
- d. a commissioner be appointed for effecting partition in terms of the preliminary decree;
- e. a final decree for partition be passed as per the report of the Commissioner,
- f. a precept be issued to the revenue authority for mutation of the plaintiff in the revenue records in respect of the suit land;
- g. a precept be issued to the Tihu Municipal Board for recording the name of the plaintiff in the Municipal records as owner and occupier of the suit land and the suit houses and for deletion of the name of the defendant No. 2 and other from the municipal records;
- h. a decree for all costs of the suit be passed against the defendant Nos. 1, 2 and 3 and any other contesting defendants;
- i. any other relief or reliefs to which the plaintiff is entitled.

5. The plaintiff sought a decree of his right, title and interest in respect of 'B' Schedule land which is reproduced hereinbelow for better appreciation of the case: -
Schedule B

An area of land measuring 1 (one) Katha, covered by KP Patta No. 4, D

ag No. 361 of Tihu Town in Tihu Mouza under Barama P.S. in the district of Nalbari with houses standing thereon which is bounded on the:

North by: Haralal Biswas
South by: Bipin Das & Ors.
East by: Kumud Ch. Nath (Defendant No. 1)
West by: Tihu Feeder Road.

6. The plaintiff brought the suit against the defendants contending inter alia that the suit houses covered by patta No. 4 dag No. 361 of Tihu town appertaining to 31 Bighas 4 Kathas 12 Lechas of the same patta described in Schedule A of the plaint and the suit land and houses described in Schedule B of the plaint belonged to the mother of the plaintiff who has been arrayed as proforma defendant No. 29 Smti Sabitri Prova Nath. The said proforma defendant No. 29 by executing a registered deed of gift No.376/88 dated 26.02.88 transferred the B Schedule land and houses to the plaintiff and the plaintiff took delivery of possession of the same accordingly. The said suit house was let out to defendant No. 3 on condition of payment of monthly rent under supervision of the defendant No. 2, who was the elder brother of the father of the plaintiff. The defendant No. 2 collected rent from the defendant No. 3 and paid the same to the plaintiff's mother (pro-forma defendant No. 29). But the defendant No. 2 in collusion with the defendant No. 3 with ulterior motive, fraudulently and collusively got his name mutated in respect of the suit property and recorded in the municipal records as owner and occupier of the suit houses though the pro forma defendant No. 29 tried to mutate her name but the defendant No. 3 supported the defendant No. 2 thereby denying the claim of tenancy under the plaintiff and hence the suit seeking the reliefs as indicated above.

7. The defendant Nos. 1 and 2 on receipt of the summons contested the suit by filing the written statement taking all the grounds available under Order 8 of the Code of Civil Procedure (Code for short) contending inter alia that the plaintiff acquired no title through deed of gift derived from his mother as she did not acquire title to the property. Their main thrust is that one Amiruddin Khalifa possessed the suit land as a tenant under the owner Hari Nath Das by constructing a house thereon and the said Amiruddin Khalifa sold his house to defendant No. 2 at Rs.1500/- by executing a registered deed on 29.03.1950 and the said house was purchased by defendant No.2 out of his own earning. Thereafter the defendant No. 2 had also obtained lease in respect of the land on which his purchased house from Hari Nath Das was standing since 1950 and since then he is in occupation by renovating the house and converting the same to a permanent structure. Subsequently he also purchased 10 Lechas of land in the suit dag from heir of Ati Ram Das by registered deed thereby he became the absolute owner in respect of 10 Lechas of land and consequently he acquired lease hold right in respect of 1 Katha over which the suit house stands. The contesting defendants denied the title of Sabitri Prova Nath and her son, the plaintiff. During the trial the defendant No. 2 died and the defendant No. 1 remained in the fray being the heir of the defendant No. 3.

8. The trial court upon the pleadings of the parties has framed the following issues: -

1. Is there any cause of action for the suit?
2. Is the suit barred by limitation?
3. Is the suit maintainable?
4. Has the plaintiff to get right and title over the land described in the Schedule 'B' of the plaint by virtue of gift deed No. 376/88 dated 26.02.88 and obtained possession thereof?
5. Is the allegation of possession and dispossession of the plaintiff from the suit land as alleged true?
6. Has the defendant No. 2 managed to get his name recorded in the Municipal records as owner and occupier of the suit houses fraudulently and collusively as alleged?

7. Is the prayer for partition of the suit land tenable?
8. Is the plaintiff entitled to decree for khas possession?
9. What relief or reliefs the parties are entitled to?

9. During the trial the plaintiff has examined as many as 8 (eight) witnesses and exhibited documents which are marked as Exhibits 1 to 20 whereas the defendants have examined three witnesses and exhibited documents which are marked as Exhibits 'Ka' to Exhibits 'Da'.

10. The learned District Judge, Nalbari took up the issue No. 4 since the entire subject matter of the disputed land rests on the decision of issue No. 4. After elaborate discussion of the evidence on record including the pleadings of the parties along with the sale deeds, lease deed and other documents vide Ext 17,18, Ext Kha, Ga, Da, Dha and Ta(1) to Ta(20) came to a finding that pro forma defendant No. 29 in the suit has acquired ownership right over 1 Katha of land in the suit dag and the gift vide Ext 14 in favour of the plaintiff at best transferred the right of ownership over 1 Katha of land without creating any title against the interest on lease of the defendant No. 2 but, however, has held that the defendant No. 1 was all along in possession of the entire suit land by constructing a permanent structure over a portion of the same by taking holding in the year 1952-53 and also by letting out the house to the defendant No. 3. On the death of defendant No.2, defendant No.1 became the sole contesting defendant and heir of defendant No.2 and thus he has acquired the lease right over a portion of the suit land and also acquired ownership right in respect of 10 Lechas of land and thus, the plaintiff has stepped to the shoes of the lessor in respect of 1 katha of the suit land and in order to get a relief of partition as well as recovery of possession, notice under section 106 of the Act, 1882 is a must and for that matter a combine notice under Section 106 of the Act 1882 and under Section 11 of the Act, 1955 must be complied with since the provisions of the Act has retrospective effect, thereby disbelieved the story of the plaintiff in regard to taking possession of the suit land by virtue of deed of gift executed in favour of the plaintiff.

11. In view of the decisions arrived at Issue No. 4, the learned trial court decided the issue No. 1 in negative, holding that the suit is apparently misconceived and no cause of action can be attributed. In regard to issue No. 2 the trial court answered the question in negative and answered the issue No. 3 in negative holding that in absence of notice under Section 106 of the Act 1882 and under Section 11 of the Act 1955, the suit is not maintainable. The trial Court while deciding the issue Nos. 5 and 6 has held that the municipal record and mutation in favour of defendant Nos. 1 and 2 cannot effect the ownership of the plaintiff acquired by him through his mother solely to the extent of ownership right and consequently thereupon answered the issue Nos. 7, 8 and 9 in negative holding that the suit is defective for want of mandatory notices thereby dismissed the suit but observed that the dismissal of the suit would not preclude the plaintiff from filing a fresh suit after complying with the mandatory notices as pointed out in the judgment and hence the instant appeal questioning the legality and validity of the judgment and decree rendered by the learned trial court.

12. On the pleadings of the parties including the evidence on record, Mr. Choudhury, learned counsel appearing for the appellant would contend that admittedly vide Ext-17, executed by the heirs of Late Hari Nath Das, viz., Shri Jiten Das and Shri Satyen Das (PW6), Shri Bipin Das (minor), Shri Mrinal Das (minor), guardian of both is elder brother Sri Jiten Das, both are sons of late Hari Nath Das, sold their land measuring 10 Lechas out of the land of Dag No. 361 of KP Patta No. 4 in Tihu town to the mother of the plaintiff. Similarly vide Ext-18 Shri Ati Ram Das, son of Late Sadhi Ram Das, Shri Nripenda Ballav Das (PW 7), Shri Provakar Ballava Das and Shri Pradip Kumar Das sons of Late Ati Ram Das sold 10 Lechas of land to the mother of the plaintiff out of the land of dag No. 361 (excluding the land sold earlier) of KP Patta No. 4 in Tihu town and thus vide

Ext 15 (Ka) and (Nya) (Jamabandi) stood mutated in the name of Smti Sabitri Prabha Nath, mother of the plaintiff. These two sale deeds and Ext. 15 would show that the purchaser got the title and possession over the land and the defendants never challenged the validity of the sale deed or Ext 15(Ka) and (Nya). But, however, the mutation of Smti Sabitri Prabha Nath was cancelled only consequent to mutation in favour of the plaintiff on the basis of Ext. 14 (gift Deed) executed by his mother and consequent mutation in favour of the donee i.e. the plaintiff vide Ext 15 (Pha) and though the contesting defendant Nos. 1 and 2 objected to the mutation of the plaintiff in place of his mother but they did not challenge the mutation of Sabitri Prabha Nath which would clearly establish that the defendants do not have any objection against title and possession of Sabitri Prabha Nath and hence title and possession of Sabitri Prabha Nath is established beyond doubt.

13. Referring paragraph 8 of the written statement, Mr. Choudhury would contend that the pleaded facts of the defendant is that one Amiruddin Khalifa was a tenant under the original owner late Hari Nath Das with respect of Schedule Kha land i.e. 1 Katha of land purchased by Sabitri Prabha and the claim of the defendants rests on Ext Kha, whereby Amiruddin Khalifa sold his house to Jaimal Nath, father of defendant Nos. 1 and 2 and husband of defendant No. 2 (a) but apart from lone recital no proof in support of their case has been adduced though the defendants claimed to have received tenancy through Amiruddin but they failed to prove tenancy of Amiruddin and hence cannot claim the benefit of a tenant within the meaning of Section 3(G) of the Act, 1955.

14. Mr. Choudhury has further drawn the attention of the Court to Ext Ga whereby the defendant claimed his tenancy right but the tenancy right was purported to be a lease for a definite term of 5 years which is determinable by efflux of time under Section 111(a) of the Act 1882 and therefore would contend that in a case of a lease for a definite period no notice to determine the same is required under Section 106 of the Act, 1882 more so, when Ext Ga is inadmissible being unregistered, which is compulsorily registrable under section 17 of the Indian Registration Act 1909 and the same suffers from consequence of Section 49 of the Registration Act and the Court must held that Ext Ga is inadmissible in evidence and once Ext. Ga goes out of record being inadmissible in evidence, than notice under Section 106 of the Act 1882 and/or under Section 11 of the Act, 1955, is not required as held by the learned trial court. Therefore, judgment and decree passed by the trial Court required interference under appellate jurisdiction, submitted Mr. Choudhury.

15. In support of his submission, Mr. Choudhury has placed reliance on the following cases:

- (1) AIR 1972 Gau 93 (Ahmed Hussain -Vs- Mayajan Nessa Choudhury & Ors.)
- and
- (2) AIR 1964 SC 461 (Pooran Chand -Vs- Motilal and others).

16. Criticizing the argument advanced by Mr. Choudhury, learned counsel appearing for the appellant/plaintiff, Mr. PC Deka, learned Senior Counsel assisted by Mr. N Deka, appearing for respondents/defendants would contend that the suit land originally belonged to one Hari Nath Das under whom Amiruddin Khalifa was a tenant who sold his house to defendant No. 2 by registered sale deed dated 29.03.1950 (Ext Kha) and out of 1 Katha 1 Lecha of land, the defendant No. 2 took lease of 25 cubit from the original owner vide Ext. Gha by an unregistered sale deed dated 1st Aghon of Assamese year 1357 which is equivalent to November 1950 and thereafter the defendant No. 2 purchased ownership right of 10 Lechas out of this 1 Katha 1 Lecha in the name of the defendant No. 1 vide Ext Ka and has been enjoying the balance 11 Lechas as tenant vide Ext. Ga, Gha, Gha(1) and (2) and Ext. Da series and staked claim of tenancy and hence justified the judgment and decree passed by the learned trial court in dismissing the suit holding that the suit is not maintainable in absence of notice under Section 106 of the

Act 1882 and/or Section 11 of the Act 1955.

17. In support of his contentions Mr. Deka has referred the following decisions: -

- (1). AIR 1983 Gauhati 38 (FB) (Kamakhya Prasad Barua -Vs- Abhiram Medhi & Ors.)
- (2). AIR 1966 SC 1908 (Biswambhar Roy (deceased) by legal representatives -Vs- Girindra Kr. Paul (deceased) by legal representatives)

18. Considered the case of the contesting parties. Perused the pleadings along with the Exhibits and evidence on record. The plaintiff appellant brought the suit seeking the reliefs viz. right, title and interest over the suit land, partition, khas possession and the preliminary decree on appointment of commission for effecting partition and final decree and a precept for mutation of the name of the plaintiff in the revenue record and municipal records. In order to substantiate his case, plaintiff has examined 8 (eight) witnesses whereas, the defendant's case rests on paragraph 8 of the written statement, wherein it has been stated that in the last settlement, the suit land appertains to dag No. 361 of KP Patata No. 4 of Tihu town and total area of dag is 1 Katha 10 Lecha of which as per Schedule 'Kha' of the plaint, he claims 1 (one) Katha land on the western side of the dag i.e. on the east of Tihu Feeder road. The original owner of the land was Hari Nath Das, father of the defendant No. 5 to 8 and one Amiruddin Khalifa possessed this land as tenant who had his own house thereon who had sold out his houses to the defendant No. 2 and delivered vacant possession on 29.03.1950 and thereafter the defendant No. 2 took the land on lease and constructed two thatched house and a cowshed and subsequently the defendant No. 2 out of his lease hold land purchased 10 Lechas of land out of 1 Katha 1 Lecha on 27.07.1981. The defendants have further averred in paragraph 12 that the father of the plaintiff ought not to have purchased the land in the name of his wife Sabitri Prabha Nath knowing fully well that the suit land including the entire land of the Dag was in possession of the defendant No. 2 since 1950, meaning thereby the defendants have claimed tenancy right over the suit land.

19. In order to prove the case, the plaintiff has brought his mother (proforma defendant No. 29) Smti Sabitri Prova Nath as PW 8 who has proved two sale deeds vide Ext 17 and 18 whereby she has purchased 10 Lechas of land each in the year 1968 and on 08.09.1972 and she has categorically deposed that at the time of purchase, she gave a notice in the newspaper inviting objection and subsequently she, by a deed of gift, vide Ext 14 had transferred the land to the plaintiff donee. The purchase of land measuring 10 Lechas each have been proved by PW 6 and PW7. Therefore, the title on the land is established.

20. The facts pleaded by the defendant No. 1 is that the land previously belonged to Hari Nath Das, Atiram and Aliram and they gave that land to Amiruddin Khalifa on lease. Constructing a house thereon, Amiruddin ran a business. Amiruddin sold the house along with the land to his father. He sold his occupancy right on 1 Katha 10 Lechas land along with the house vide Ext Kha. DW 1 has further deposed that after purchasing the house and land from Amiruddin, father of DW1 made lease agreement with owner of the land Hari Nath vide Ext. Ga (Under objection) and subsequently purchased 10 Lechas of land out of 1 Katha 10 Lechas. The DW 2 has deposed that the land was on lease and DW 3 has proved the sale deed Ext Ka, whereby Nripen Das sold 10 Lechas of land to Kumud Nath (DW1).

21. From the depositions of the DW's it is clear that the DW 2 was a lessee under Hari Nath and Amiruddin was also a lessee under Hari Nath. Amiruddin constructed a house standing thereon though the defendants have withheld examining Amiruddin to prove the construction of the house on the leasehold land. Therefore the Court is required to examine as to whether the lessee can claim right over the leasehold land as occupancy tenant. The lease was admittedly for five years and lease of immovable property under section 111(a) of the Act, 1882 by efflux

of time limited thereby and no notice under Section 106 of the Act, 1882 is required in order to determine the lease. For better appreciation of the case it would be appropriate to have a look at section 111(a) read with section 108 of the Act 1882. When such automatic statutory determination of lease takes place, section 108(G) of the Act, 1882 gets simultaneously attracted against the erstwhile lessee. Section 108 deals with the rights and liabilities of the lessors and lessees. Section 108(G) provides that on determination of lease, the lessee is bound to put the lessor into possession of the property which was not done by the lessee on determination of lease and on sale of the land to the mother of the plaintiff, the defendant being lessee ought to have put the purchaser in possession of the property to the landlord and therefore the plaintiff is entitled to base his cause of action and hence notice under Section 106 of the Act 1882 is not required and hence the finding of the learned trial court is perverse requiring interference under appellate jurisdiction.

22. Now the question to be answered as to whether the notice under section 11 of the Act, 1955 is required as held by the learned trial court. Admittedly, the defendants claimed tenancy right (vide Ext Ga) over the land, which, however, was not registered under the Registration Act. The lease deed even if accepted as a lease deed, in absence of registration it would reveal that only 25 (twenty five) cubits of land was leased out which was alleged to have been executed by Late Hari Nath. The said Ext 'Ga' was not confronted by PW 6 and 7 at the time of cross-examination. These two witnesses PW 6 and 7 are sons of Hari Nath Das and Ati Ram Das respectively and their depositions would clearly show that after the execution of the deed of sale he delivered the possession of the land and later they could know from Jaimal Nath (father of defendant No. 1) that the house thereon belong to Sabitri (mother of the plaintiff). The deposition of PW 7 would further clarify that at the time of selling the land to Sabitri Nath a house was there on the land and at the time of delivering the possession, defendant No. 2 Jaimal Nath (father of the defendant No. 1) was present. Moreover in view of paragraph 12 of the written statement, it is clear case of the defendants that the father of the plaintiff ought not to have purchased the land in the name of his wife Sabitri Prova Nath when he was aware that the suit land, including the entire land of the dag was in possession of the defendant No. 2 since 1950 which clearly demolished the plea of tenancy of the defendants, more so when the defendant No. 1 in cross-examination has admitted that out of the total 1 Katha 10 Lechas land, he purchased 10 Lechas and Sabitri purchased 1 Katha land in total in two installments. Therefore, the tenancy right over the land (vide Ext Ga) as argued falls being inadmissible in evidence in absence of registration and section 3(G) of the Act, 1955 would not come into play meaning thereby that the defendants cannot claim protection under Section 11 of the said Act, 1955 and the defendants have not accepted the plaintiff as landlord and section 3(f) of the Act, 1955 would not come in aid of the defendants and hence the notice under Section 11 of the Act, 1955 is not required as held by the learned trial Court.

23. In the case of Ahmed Hussain Vs. Nayajan Nessa Choudhury, reported in AIR 1972 Gau 93 (Supra) cited by Mr. Choudhury, learned counsel appearing for the plaintiff/appellant this Court has held that the tenancy derived through another tenant cannot claim to be tenant under section 3(G) of the Act, 1955 when he has failed to prove the tenancy of the alleged prior tenant. Considering the entire facts and circumstances of the case, the instant appeal is squarely covered by the case of Ahmed Hussain (supra).

The case reported in AIR 1964 SC 461 Pooran Chand Vs. Motilal (Supra) as referred to on behalf of the plaintiff/appellant would support the case of the plaintiff wherein the Apex Court has held that when tenancy is determined by efflux of time, no notice is required under Section 106 of the Act, 1882.

24. In the case of Biswambhar Roy Vs. Girindra Kumar Paul, the decision cited by Mr. Deka, learned Senior counsel appearing for the defendants/respondents and reported in AIR 1966 SC 1908 (supra) the Apex Court has held that in order to

claim protection under section 5(1)(a) of the Act, 1955 the tenant must prove three conditions, viz.: -

a. That under the terms of the contract of tenancy, the tenant is entitled to build on the land of the tenancy,

b. That pursuant to such liberty he has actually built within the period of 5 years from the date of contract the permanent structure on the land of the tenancy; and

c. That the permanent structure is for residential or business purpose.

25. In the present case in hand, the land on which tenancy is claimed belonged to Hari Nath and the defendants purchased the house from Amiruddin Khalifa (vide Ext Kha). But thereafter the alleged lease agreement was executed (vide Ext. Ga) by Hari Nath which is not admissible in evidence for want of registration and hence the case referred in Biswambhar Roy (supra) would not help the defendants.

The other case referred to in Kamakhya Prasad Barua Vs. Abhiram Medhi and reported in AIR 1983 Gau 38 (FB) (supra) relates to a case where a tenant earned immunity against eviction by constructing a permanent structure within 5 years of tenancy, the same would not be lost because that structure was gutted by fire and the tenant could build another structure only after expiry of five years. The court dealing with that case has found that

there was a lease agreement, whereas, the alleged agreement (vide Ext Ga) in this case being inadmissible in evidence the case referred to in Kamakhya Prasad Barua (supra) would not help the defendants/respondents.

26. In the result and for the reasons stated herein above, the appeal stands allowed. The judgment and decree dated 31.03.1997 passed by the learned District Judge, Nalbari in Title Suit No. 22 of 1991 is set aside holding that the notice neither under Section 106 of the Transfer of Property Act 1882 nor under Section 11 of the Assam Non-Agricultural Urban Areas Tenancy Act 1955 are required and thus a preliminary decree be drawn accordingly. The case is remitted back to the trial court for effecting the partition of the suit land as provided under Order 20 Rule 18 of the Code and thereafter to pass a final decree.

27. Send down the lower court records.